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Zoning and Land Use

Arthur J. Anderson

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ZONING AND LAND USE

Arthur J. Anderson*

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I. ANNEXATION¹

IN *JNC Partners Denton, LLC v. City of Denton*,² the Fort Worth Court of Appeals considered an issue of increasing importance in annexation law, the nature of the section 43.052(i) right of a landowner to compel arbitration when a city refuses to include the land in a three-year annexation plan.³ *JNC Partners* is the second case construing this right since 2005. The other case, *Hughes v. City of Rockwall*,⁴ involved a similar set of facts. In *Hughes*, the City of Rockwall proposed to annex two tracts of land owned by the Estate of W.W. Caruth, Jr., of which Hughes was the sole independent executor. The Estate objected to the proposed annexations and petitioned Rockwall to include the land in a three-year annexation plan as provided by section 43.052(c) of the Texas Local Government Code. After Rockwall denied the request, the Estate requested arbitration under section 43.052(i) of the Texas Local Government Code. The court framed the issue created by these facts as “whether, under section 43.052(i), the landowner may request and is entitled to arbitration if the municipality refuses to include his land in a three-year plan.” Oral argument before the Texas Supreme Court was held in *Hughes* on January 16, 2006.⁵

In *JNC Partners*, JNC petitioned the City of Denton for consent to create a water control and improvement district. Denton failed to respond to this petition, and after two months passed, the city announced its intention to annex roughly 5,900 acres, which included all of the property

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1. This Article covers cases from the Survey period of January 1, 2006 through February 9, 2007, that the author believed were noteworthy because they added to the jurisprudence on the applicable subject. The author is indebted to Tommy Mann for his assistance with the review of cases and drafting portions of this Article.

2. 190 S.W.3d 790 (Tex. App.—Fort Worth 2006, pet. granted).

3. *Id.* at 791.

4. 153 S.W.3d 709 (Tex. App.—Dallas 2005, pet. filed).

5. *Id.* at 710-12.

owned by JNC Partners in accordance with section 43.052(h) of the Texas Local Government Code. JNC Partners opposed this proposed annexation and submitted a request to compel arbitration under section 43.052(i) of the Texas Local Government Code. The court determined that it faced the same issue presented in *Hughes*, stating “a threshold question of law in this case is whether a landowner may compel arbitration under section 43.052(i) when a municipality denies a petition to include the landowner’s property in a three-year annexation plan.”⁶

Both the City of Rockwall and the City of Denton asserted that a quo warranto proceeding brought by the state was necessary to challenge the irregularities in the annexation process claimed by the landowners. However, the Dallas Court of Appeals in *Hughes* stated that, if the position forwarded by these cities was correct, it “would have to read the statute to provide that a landowner could not actually initiate arbitration. All it could do is ask.”⁷ Refusing to adopt this reading of the statute, the court opined, “[i]nstead, we read the plain language of the statute to provide that, if Rockwall fails to take action on the petition to include the area in the annexation plan, the landowner may request arbitration of the dispute.”⁸

In *JNC Partners*, the court of appeals adhered to the reasoning of *Hughes* and denied Denton’s argument, based on the statutory language of section 43.052(i) that the right to arbitrate only arises when the city “fails to take action on the petition.”⁹ The court rejected Denton’s argument that it had “taken action” on the petition by denying it.¹⁰

The court in *JNC Partners* went on to consider the issue of “whether JNC proved a probable right to prevail on its request to compel arbitration.”¹¹ The court answered this question by strictly interpreting the language of the statute. Specifically, the court pointed to the language of section 43.052(i), which states that a “‘violation’ occurs when a city proposes to ‘separately annex two or more areas described by Subsection (h)(1) if no reason exists under generally accepted municipal planning principles and practices for separately annexing the areas.’”¹² Based on this statutory language, the court concluded that “43.052(i) creates a right to arbitrate only when the municipality proposes to separately annex multiple ‘areas’ in violation of the section.”¹³ Furthermore, because “Denton proposed to annex but one area,” the right to compel arbitration under section 43.052(i) was not triggered on the facts presented.¹⁴

6. 190 S.W.3d at 793.

7. 153 S.W.3d at 713.

8. *Id.* at 713-14.

9. 190 S.W.3d at 793.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 794.

Justice Walker vehemently rejected the majority's reasoning in her dissent because it created an easy loophole by which municipalities could circumvent the right to compel arbitrations through serial annexations. Justice Walker asserted that the majority's construction of the statute "renders the right to arbitration codified in section 43.052(i) meaningless because so long as the municipality sequentially annexes each individual 43.052(h)(1) area—never implementing concurrent annexation proceedings for section 43.052(h)(1) areas—the right to arbitration is never triggered."¹⁵ The dispute between the majority and the dissent in this case did not go unnoticed by the Texas Supreme Court, which has granted a petition for review in the case and should be issuing an opinion in the near future in conjunction with the *Hughes* case.

JNC Partners and *Hughes* involved annexations where the cities refused to comply with the three-year plan. The San Antonio Court of Appeals addressed the situation where the City of San Antonio attempted to enforce a three year plan. In *City of San Antonio v. Summerglenn Property Owners Association, Inc.*,¹⁶ homeowners associations and individual property owners challenged the validity of a three-year annexation plan proposed by the City of San Antonio. Pursuant to section 43.0562 of the Texas Local Government Code, the city held a series of negotiations regarding the service plan with representatives from the areas proposed to be annexed. However, before these negotiations occurred, the Summerglenn Property Owners Association and some individual landowners requested arbitration under section 43.0564 of the Texas Local Government Code. The city denied this request for arbitration, stating that it was "premature because negotiations must be completed before arbitration is proper under § 43.0564."¹⁷ The property owners filed suit against the city for denying their right to compel arbitration, and the trial court ruled in the property owners' favor, issuing a temporary injunction enjoining the city and its officials from taking any further steps in the annexation process.¹⁸

On appeal, the city made two principal claims: (1) the property owners lacked standing to allege a violation of the right to compel arbitration, and (2) House Bill 585, which

prohibits a municipality with a population of one million or more, that has operated for at least 10 years under a three-year annexation plan similar to the plan described in § 43.052, from annexing an area in its extraterritorial jurisdiction ("ETJ") that is north and east of I.H. 10 and that is either adjacent to the municipality's boundaries or within 1 ½ miles of a deferred annexation area,¹⁹

was an unconstitutional "local law."²⁰

15. *Id.* (Walker, J., dissenting).

16. 185 S.W.3d 74 (Tex. App.—San Antonio 2005, pet. denied).

17. *Id.* at 79.

18. *Id.* at 79-81.

19. *Id.* at 80.

20. *Id.* at 80.

The city successfully differentiated this case from *Hughes* in two ways by arguing,

- (i) it has not failed or refused to arbitrate since the arbitration request by Summerghlen prior to commencement of negotiation was premature, and the City has stated that it was and still is willing to arbitrate; and (ii) the property owners are not seeking to enforce their statutory right to arbitration as in *Hughes*, but rather to prohibit annexation altogether.²¹

The court of appeals concluded that both of these distinctions were valid, and noted that “the court in *Hughes* did not hold that denial of the right to arbitration renders an annexation without authority, or void, but merely that a private landowner has standing to sue to compel arbitration under § 43.0564.”²² Thus, “at most, the property owners have standing only to compel arbitration under § 43.0564.”²³

Because the court of appeals viewed that resolution of the “constitutionality of [House Bill] 585 was necessary to a determination of whether the property owners [had] standing,” the court of appeals considered the trial court to have implicitly ruled that House Bill 585 was not an unconstitutional “local law.”²⁴ Thus, the court of appeals went on to rule on the constitutionality of House Bill 585. Given the highly specific parameters of House Bill 585, the court of appeals concluded that “[House Bill] 585 singles out a specific geographic area of the City of San Antonio’s ETJ for special treatment without any reasonable basis, and without other authority in the Constitution, and is therefore a prohibited local law.”²⁵ Thus, both of the principal issues raised by the City of San Antonio were decided in its favor by the court of appeals.²⁶

The petitioning requirements for a voluntary annexation were addressed in *Karm v. City of Castroville*.²⁷ Karm petitioned for voluntary annexation, withdrew the request, and sued the city for violating his rights under the Municipal Annexation Act. Karm owned about eighteen acres in the extraterritorial jurisdiction of Castroville, and he entered into negotiations to sell five of the eighteen acres to be developed as a health club. Karm petitioned for voluntary annexation on March 5, 2004, and after two public hearings were held, he withdrew his consent for voluntary annexation. The city, however, proceeded with the annexation. When Payne sought a building permit for the health club, it was denied because the newly annexed property had been zoned residential.²⁸

Pursuant to section 43.028 of the Texas Local Government Code, “the

21. *Id.* at 85.

22. *Id.* at 86.

23. *Id.*

24. *Id.* at 88.

25. *Id.* at 89.

26. *Id.* at 90.

27. 219 S.W.3d 61 (Tex. App.—San Antonio 2006, no pet. h.).

28. *Id.* at 63.

City had thirty days thereafter to grant the petition.”²⁹ The city claimed that it granted the petition by the act of scheduling a public hearing for March 22, 2004. The San Antonio Court of Appeals reasoned that “the fact that the City of Castroville set the dates for a public hearing at a meeting, without any indication of a deliberative process or an affirmative action as to the petition, does not amount to compliance under section 43.028.”³⁰ Thus, the court of appeals held that “the trial court erred in failing to disannex the property.”³¹

The court of appeals declined to address the appellants’ assertion that their rights to develop the property vested under Chapters 43 and 245 of the Texas Local Government Code.³² The court of appeals noted that these provisions apply “after a municipality annexes an area within its ETJ,” and thus, based on the determination “that the City failed to comply with the requirements of Section 43.028, and that the annexation was void, discussion of the effects after annexation is unnecessary.”³³

II. ZONING

The Texas Supreme Court decided two notable cases dealing with zoning issues during the Survey period. The first case, *City of Dallas v. Vanesko*,³⁴ involved a sympathetic set of facts. The Vaneskos decided to build a new house, and “they also decided to design the new structure themselves, without the assistance of architects and engineers, and act as their own general contractor.”³⁵ Furthermore, the city gave its preliminary approval of the building plans, and “City inspectors frequently visited the site without complaint.”³⁶

A problem arose when it became evident that the Vanesko’s home was going to be roughly eight feet higher than the maximum height of thirty feet allowed under the R-10 zoning district in which the home was located. The city inspectors realized this problem, but, instead of ordering the Vanesko’s to halt construction, “recommended that the Vaneskos seek a height variance from the City of Dallas Board of Adjustment.”³⁷ When the Vaneskos sought this variance, eighty percent of their neighbors, as well as the city staff, openly supported allowing it. The remaining neighbors did not actively oppose the variance. Nonetheless, the Board of Adjustment still denied the request.³⁸

By a writ of certiorari, the Vaneskos appealed to the Dallas County District Court, which granted their appeal. Although the Dallas Court of

29. *Id.*

30. *Id.* at 64.

31. *Id.*

32. *Id.*

33. *Id.* at 65.

34. 189 S.W.3d 769 (Tex. 2006).

35. *Id.* at 770.

36. *Id.*

37. *Id.* at 771.

38. *Id.*

Appeals upheld the trial court, the Texas Supreme Court reversed and upheld the decision of the Board of Adjustment. The case centered on an interpretation of the Dallas City Code.³⁹

Section 211.009(a)(3) of the Texas Local Government Code stipulates that a variance can be granted if it is not contrary to the public interest and a literal enforcement of the ordinance would create an unnecessary hardship on the property.⁴⁰ However, section 51A-3.102(d)(10) of the Dallas City Code is more restrictive. As the supreme court noted, the Dallas City Code stipulates that a variance may not be granted to relieve a "self created or personal hardship," for financial reasons only, or to permit any person a privilege in developing a parcel of land.⁴¹

Focusing on these more restrictive provisions of the Dallas City Code, the supreme court reasoned that "it was the way the Vaneskos chose to design their house that created the hardship about which they now complain, for there was nothing about this parcel of land which required a roof higher than what the zoning ordinance allowed."⁴² As a result of this reasoning, the supreme court concluded that "the Vaneskos' hardship is personal and self-created—a condition for which the Dallas zoning ordinance prohibits relief."⁴³

The Vaneskos argued further that "the Board's decision was erroneously influenced by the city attorney's instruction that the Board could not consider whether a permit had been issued in error. . . ."⁴⁴ The supreme court, however, relied on the language of the Dallas City Code, noting, "the Dallas City Code makes no mention of the particular relevance of a building permit, and we can hardly say the Board abused its discretion by failing to consider a factor that it was not directed, by ordinance, to consider. . . ."⁴⁵ Thus, the supreme court upheld the decision of the Board of Adjustment to deny the Vaneskos' request for a variance.⁴⁶

Justice O'Neill dissented based on a concern that "the board of adjustment misunderstood the level of discretion that the ordinance afforded."⁴⁷ Justice O'Neill argued that the "evidence that the board in this case was admonished not to consider is certainly relevant to the elements" listed in the Dallas City Code.⁴⁸ Specifically, Justice O'Neill argued that the fact that no neighbors opposed the variance provided "some indication, though not conclusive, that the variance would not be 'contrary to public interest.'"⁴⁹

Furthermore, the dissent reasoned that "[t]he hardship here was not

39. *Id.*

40. *Id.* at 772.

41. *Id.*

42. *Id.* at 774.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* (O'Neill, J., dissenting).

48. *Id.* at 775 (O'Neill, J., dissenting).

49. *Id.* (O'Neill, J., dissenting).

entirely self-created, as the city inspector was at least equally culpable.”⁵⁰ Justice O’Neill also pointed out the perceived absurdity of construing the Dallas City Code to require that no consideration be given to personal hardship in deciding whether to grant a variance. Rather, Justice O’Neill argued, “the logical interpretation is that personal hardship cannot be the *sole* basis for a variance.”⁵¹ Based on this reasoning, the dissent would have remanded the case for the Board of Adjustment’s reconsideration.⁵²

The second notable zoning case decided by the Texas Supreme Court also involved an erroneously issued building permit. In *City of White Settlement v. Super Wash, Inc.*,⁵³ Super Wash submitted a site plan for approval by the city staff in order to operate a car wash business. Super Wash was unaware that the existing zoning ordinance for the property required the maintenance of a six-foot privacy fence along Longfield Drive to prevent commercial traffic from spilling over into the adjacent neighborhood. Super Wash’s site plan did not provide for this privacy fence, but, nevertheless, a city staff member erroneously approved the plan. Not unsurprisingly, the neighborhood for which the privacy fence’s use was intended brought suit. The trial court granted the city’s motion for summary judgment, and Super Wash appealed. The court of appeals affirmed all of the trial court’s rulings except for the issue of estoppel. The court of appeals held, “there were issues of material fact regarding whether the City official’s acts were authorized, whether this was the type of case that required estoppel, and whether the City would be prevented from exercising its governmental functions if it were estopped from enforcing the Ordinance.”⁵⁴

In addressing these issues, the supreme court began by reciting the general rule that “a city cannot be estopped from exercising its governmental functions.”⁵⁵ The supreme court proceeded to lay the policy basis for this rule, stating, “the rule derives from our structure of government, in which the interest of the individual must at times yield to the public interest and in which the responsibility for public policy must rest on decisions officially authorized by the government’s representatives, rather than on mistakes committed by its agents.”⁵⁶

The supreme court next identified an exception to the general rule known as the “justice requires” exception, which states that “a municipality may be estopped in those cases where justice requires its application, and there is no interference with the exercise of its governmental functions.”⁵⁷ In construing this exception and summarizing the major cases applying it, the supreme court stated that the exception involves cases in

50. *Id.* at 776 (O’Neill, J., dissenting).

51. *Id.* (O’Neill, J., dissenting) (emphasis in original).

52. *Id.* (O’Neill, J., dissenting).

53. 198 S.W.3d 770 (Tex. 2006).

54. *Id.* at 772-73.

55. *Id.* at 773.

56. *Id.*

57. *Id.* at 774 (quoting *City of Dallas v. Rosenthal*, 239 S.W.2d 636 (Tex. Civ. App.—Dallas 1951, writ ref’d n.r.e.)).

which, "there [is] evidence that city officials may have affirmatively misled the parties seeking to estop the city and the misleading statements [result] in the permanent loss of [the plaintiff's] claims against the cities."⁵⁸

The supreme court refused to apply this exception to the facts of this case because Super Wash was merely seeking to estop the government from forcing it to build a second entrance, and as the business had been "operating for years without this second entrance/exit," there was "nothing in the record to indicate that it [was] necessary for its continued operation."⁵⁹ Furthermore, "the Ordinance was a matter of public record and discoverable by Super Wash before it purchased the lot."⁶⁰ Super Wash attempted to counter that the city had benefited by enlarging its tax base with a commercial business in the area, but the court stated that this benefit was "simply too attenuated."⁶¹

Next, the supreme court considered whether estopping the city in this case would interfere with the city's ability to perform its governmental functions. The supreme court began its consideration of this point by narrowing the issue, stating, "in the context of estopping a city's enforcement of a duly enacted ordinance, the court should consider whether estoppel will affect public safety, bar future enforcement of the ordinance, or otherwise impede the city's ability to serve the general public."⁶² Because the fence requirement was injected into the ordinance at the request of neighboring citizens, the supreme court reasoned that, "estopping the City would impede the City's attempt to answer the concerns of residents. . . ."⁶³ Furthermore, the supreme court reasoned that estopping the city from enforcing the ordinance would "preclude the City from employing its chosen method of regulating traffic along Longfield Drive and, thereby, remove some of its discretion in determining how to best protect the public's safety. . . ."⁶⁴ Accordingly, the supreme court ruled that estopping the zoning ordinance would interfere with the governmental functions of the city and reversed the court of appeals.⁶⁵

The other case of note in the area of zoning was decided in the Fort Worth Courts of Appeals. *Teague v. City of Jacksboro*⁶⁶ involved a jurisdictional issue under section 214.0012(a) of the Texas Local Government Code. Teague owned property in Jacksboro, Texas and received a notice from the city requiring him to demolish a structure on his property and abate all unsafe conditions on the property within thirty days. Instead of complying with this notice, Teague sued the city claiming that the zoning ordinance was constitutionally defective. The trial court granted the

58. *Id.* at 775.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 777.

63. *Id.*

64. *Id.* at 777-78.

65. *Id.* at 778.

66. 190 S.W.3d 813 (Tex. App.—Fort Worth 2006, pet. denied).

city's plea to the jurisdiction in the suit, determining the following: (1) section 214.0012 of the Texas Local Government Code requires a writ of certiorari to be filed within thirty days of the final decision received from the city, (2) the criteria in this section of the Local Government Code are jurisdictional prerequisites for obtaining a review of an order of demolition, (3) compliance with section 214.0012 is a statutory prerequisite to the waiver of governmental immunity under Chapter 214, and (4) Teague's failure to file for a writ of certiorari was a fatal jurisdictional defect to his case.⁶⁷ Teague's original petition, filed within thirty days of the city's decision, did not contain a request for a writ of certiorari, but he did file a later request for a writ of certiorari outside of the thirty-day window.⁶⁸

The court of appeals initially considered the issue of whether Teague's filing against the city, without filing for a writ of certiorari, was enough to trigger the subject matter jurisdiction of the court. In considering this issue, the court of appeals began by laying out the parameters of section 214.0012 of the Texas Local Government Code. Section 214.0012(a) states that a landowner must file a petition contesting the legality of a city's action within thirty days, and section 214.0012(b) states that upon receipt of this petition, the court "may issue a writ of certiorari"⁶⁹ Based on these provisions, the city contended that, "for its governmental immunity to be waived under section 214.0012, the statute requires Teague not only file a verified petition stating the illegality of the City's decision within thirty days . . . but also to request within that same thirty-day period that the trial court issue a writ of certiorari."⁷⁰

Teague's original petition did not request a writ of certiorari or claim any relief under section 214.0012. The court of appeals considered each of these two omissions independently in deciding whether Teague had properly invoked the subject matter jurisdiction of the court. The court of appeals concluded that Teague's failure to specifically seek relief under section 214.0012 was not fatal because, in the words of the statute, his petition "fit the requirements of Section 214.0012(a) by 'setting forth that the decision is illegal, in whole or in part, and specifying the grounds of the illegality.'"⁷¹

The court of appeals next considered whether Teague's failure to request a writ of certiorari within thirty days was fatal. The court relied on the Texas Supreme Court case of *Davis v. Zoning Board of Adjustment of La Porte*.⁷² The court of appeals summarized *Davis* as standing for the proposition that, "to invoke the trial court's jurisdiction under [a different section of the Local Government Code], the plaintiffs need only have filed a petition challenging the action complained of within the time pe-

67. *Id.* at 815-16.

68. *Id.*

69. *Id.* at 817.

70. *Id.*

71. *Id.* at 818-19.

72. 865 S.W.2d 941 (Tex. 1993).

riod set forth in the statute.”⁷³ The court of appeals extended this reasoning to section 214.0012. The court of appeals reasoned that such a construction “comports with the plain language of section 214.0012(a), which requires only that the party ‘file . . . a verified petition setting for that the decision [of the city] . . . is illegal’ within the thirty-day time period.”⁷⁴ Based on this construction of the statute, the court of appeals held that, “Teague was not required to request issuance of a writ of certiorari in his original petition to invoke the trial court’s subject matter jurisdiction under section 214.0012, and his subsequent request for writ of certiorari . . . was timely.”⁷⁵

III. INVERSE CONDEMNATION

The Texas Supreme Court ruled adversely to landowners in two inverse condemnation cases during the Survey period. In *Hallco Texas, Inc. v. McMullen County*,⁷⁶ the supreme court considered a takings claim asserted by Hallco, the purchaser of a property intended to be used as a “Class I nonhazardous industrial waste landfill.”⁷⁷ Eleven days after Hallco purchased its property, the McMullen County Commissioners Court adopted a resolution expressing its opposition to Hallco’s proposed use. Nevertheless, Hallco filed an application to operate an industrial waste landfill with the Texas Commission on Environmental Quality, and the application was granted.⁷⁸

McMullen County then enacted an ordinance prohibiting the disposal of solid waste within three miles of Choke Canyon Lake, effectively prohibiting the disposal of industrial solid waste on Hallco’s property. The county derived authority for passing the ordinance from section 364.012 of the Health and Safety Code, which allows a county to prohibit industrial solid waste disposal in an area as long as it designates another area in which the waste can be disposed. By the time the ordinance was passed, Hallco claimed to have invested over \$800,000 in the site. In June 1995, Hallco challenged the ordinance in federal district court along with a parallel proceeding in state court.⁷⁹

The federal district court dismissed Hallco’s claims because it found the ordinance to be rationally related to the legitimate governmental purpose of protecting the lake as a source of drinking water. The state court granted the county’s motion for summary judgment without specifying the grounds. The court of appeals affirmed the trial court’s judgment because it did not find that Hallco had a cognizable property interest of which it could be deprived.⁸⁰

73. *Teague*, 190 S.W.3d at 819-20.

74. *Id.* at 820.

75. *Id.*

76. 221 S.W.3d 50 (Tex. 2006).

77. *Id.* at 52.

78. *Id.* at 53.

79. *Id.* at 52-54.

80. *Id.* at 54.

More than two years after the court of appeals' verdict, and slightly less than six years after the ordinance was passed, Hallco requested a variance from the requirements of the ordinance. After a hearing, the county took no action on the request. Hallco subsequently filed another lawsuit in which it:

expressly disavowed any challenge to the ordinance's validity. Instead, Hallco alleged that by denying its variance request the County had taken, damaged, or destroyed Hallco's property for public use in violation of article I, section 17 of the Texas Constitution. Hallco also alleged that the County had taken its property without just compensation in violation of the Fifth Amendment to the United States Constitution.⁸¹

The county again moved for summary judgment alleging, "that Hallco had no constitutionally protected property right to use its land for solid waste disposal, and that even if it did, the County reasonably exercised its police power."⁸²

The supreme court characterized Hallco's position as contending that "a landowner *always* has a reasonable investment-backed expectation in pursuing a development project that was lawful when the land was purchased and need not demonstrate that it has secured all necessary permits in order to pursue a takings challenge."⁸³ Furthermore, Hallco claimed that, "the ordinance decreased the value of its property by ninety-nine percent and it had a distinct investment-backed expectation that it would be able to use its property to operate a solid-waste disposal facility when it received its permit from the Commission."⁸⁴

The supreme court ultimately decided the issue based on the principle of res judicata.⁸⁵ Hallco attempted to argue that the doctrine of res judicata did not apply "because Hallco's claim in the previous suit was a facial constitutional challenge to the ordinance while this suit challenges the County's particular application of the ordinance to its property, and its as-applied takings claim was not ripe in *Hallco I* because it had not sought a variance from the ordinance."⁸⁶

The supreme court rejected Hallco's argument because:

this was a no zoning ordinance; the ordinance here prohibited precisely the use Hallco intended to make of this property, and nothing in the ordinance suggested any exceptions would be made. Hallco's taking claim was ripe upon enactment because at that moment the "permissible uses of the property were known to a reasonable degree of certainty."⁸⁷

81. *Id.* at 55.

82. *Id.*

83. *Id.* at 57.

84. *Id.*

85. *Id.* at 58.

86. *Id.*

87. *Id.* at 60 (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 620 (2001)).

Even though it was styled as a “variance request,” the supreme court reasoned that “Hallco’s request was nothing more than a demand for the County to reconsider what had been its position all along.”⁸⁸ As such, the supreme court held, “Hallco’s facial and as-applied challenges were the same regardless of how Hallco chose to frame its pleadings, and res judicata bars another bite at the apple.”⁸⁹

Hallco attempted to assert further that its Fifth Amendment takings claim was not barred in the same manner as the facial challenge, but the supreme court cited the holding of the United States Supreme Court in *Allen v. McCurry*,⁹⁰ which required “all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so.”⁹¹ As a result, Hallco’s claim in *Hallco II* was deemed barred by the ruling in *Hallco I*.⁹²

The majority ruling sparked a vigorous and lengthy dissent from Justices Hecht, Medina and Willett. In the dissent, the justices harped on the issue of ripeness. The dissenting justices agreed that Hallco’s facial challenge was not ripe. However, the justices pointed to the United States Supreme Court case of *Williamson County Regional Planning Commission v. Hamilton Bank*,⁹³ in which the Court held, “an as-applied claim is not ripe until the regulatory authority has made a final decision regarding the application of the regulation to the property,” in contending that Hallco’s as-applied challenge was not ripe until its request for a variance was denied.⁹⁴

The dissenters pointed out the “embarrassing fact” that the county had argued during *Hallco I* that it “‘had the authority to grant a variance, or even to rescind the ordinance, if Hallco presented sufficient justification,’ and therefore Hallco’s action was not ripe because it ‘had not obtained a final decision from the County.’”⁹⁵ Given that the county had made these representations to Hallco during the first litigation, the dissenting justices viewed the case as one that “illustrates how the government can use this ripeness requirement to whipsaw a landowner.”⁹⁶ The dissent insisted that the supreme court should have “tak[en] the County at its word and remand[ed] the case for proceedings on the merits. . . .”⁹⁷

Another example of the Texas Supreme Court restricting the scope of private property rights is *City of San Antonio v. TPLP Office Park Partners*.⁹⁸ In 1999, the City of San Antonio began taking action to block access from the driveway for a business park to a city street. TPLP devel-

88. *Id.*

89. *Id.*

90. 449 U.S. 90 (1980).

91. *Id.* at 96.

92. *Hallco*, 221 S.W.3d at 62.

93. 473 U.S. 172 (1985).

94. 221 S.W.3d at 63 (quoting 473 U.S. at 186).

95. *Id.*

96. *Id.*

97. *Id.* at 64.

98. 218 S.W.3d 60 (Tex. 2007).

oped an office park fronting on I-10 in San Antonio. There was limited access to I-10, and the plat for the office park showed a driveway connecting to Freiling Drive. In response to neighborhood complaints about increased traffic on Freiling, the city decided to close the street/access connection. The owner of the private driveway filed suit, seeking a declaratory judgment and an injunction preventing the city from blocking the driveway's access to the street. The trial court, "rendered judgment declaring that (1) the attempted closure of the Freiling Drive street/access [was] an unreasonable exercise of the City's police power; . . . [(2)] closure of the Freiling Drive street/access would result in a compensable taking of the property rights of TPLP; and [(3)] the City was estopped as a matter of law from closing the street/access."⁹⁹ "The court of appeals affirmed."¹⁰⁰ The supreme court reversed, holding that the city's decision and actions to close access between the private driveway and the street constituted a proper exercise of the City's police power, and closing the access would not constitute a compensable taking.¹⁰¹

The supreme court first addressed the standard of review applicable to the city's ordinances and other actions in limiting vehicular access to Freiling Drive via the driveway. "Under the rational relationship standard, the City's decisions must be upheld if evidence in the record shows it to be at least fairly debatable that the decisions were rationally related to a legitimate governmental interest."¹⁰²

"The City argue[d] that closure of access to Freiling [was] related to at least two governmental interests: safety and separating commercial traffic from a residential neighborhood to improve the residents' quality of life"¹⁰³ Although TPLP presented evidence at the supreme court hearing that the driveway did not create a safety hazard, the supreme court noted that evidence was introduced that "closure of access to Freiling would separate commercial traffic from residential" traffic, and "improve the quality of life for . . . residents along Freiling."¹⁰⁴

With respect to the denial of access issue, the supreme court stated that, "access to a business was not materially and substantially impaired when one access point was closed, but another access point on a public street remained unaffected."¹⁰⁵ The supreme court further noted that, "[i]f the access to Freiling [was] closed, at least six points of egress and ingress along the I-10 access road [would] remain at the front of the business park."¹⁰⁶ Even though the remaining access points were inconvenient, there was not a substantial impairment of access and no inverse

99. *Id.* at 61-62.

100. *Id.* at 63.

101. *Id.* at 62.

102. *Id.* at 65.

103. *Id.*

104. *Id.* at 64.

105. *Id.* at 66 (citing *Archenhold Auto Supply Co. v. City of Waco*, 396 S.W.2d 111, 114 (Tex. 1965)).

106. *Id.* at 66.

condemnation.¹⁰⁷

"Finally, the City argue[d] that the trial court and [the] court of appeals erred in holding that the City was estopped from closing the driveway's access to Freiling."¹⁰⁸ With regard to estoppel, the court stated:

in exceptional cases a city may be estopped from taking certain actions where circumstances demand application of the doctrine to prevent manifest injustice. But, even if doing justice would otherwise warrant applying principles of estoppel, courts will not apply the doctrine if doing so interferes with a city's ability to perform its governmental functions.¹⁰⁹

TPLP argue[d] that justice require[d] application of the doctrine of estoppel in this case because the City approved the driveway by approving the plat depicting [it] in 1975, and it relied on the plat to confirm access to the property when it decided to purchase the property and spend over \$1 million on improvements.¹¹⁰

Although "these facts depict[ed] a situation where doing justice might warrant application of estoppel principles,"¹¹¹ the supreme court ruled that estopping a city from employing its chosen method to regulate traffic would improperly interfere with the city's performance of its governmental functions."¹¹² As a result, the city was not estopped from closing the driveway.¹¹³

*City of Dallas v. Blanton*¹¹⁴ addressed whether a city mandate to owners of older buildings to reroute on-site plumbing lines to new service lines installed by the city was a regulatory taking. The City of Dallas implemented a plan to replace old, substandard sewer mains located underneath and at the back of the properties in the Deep Ellum area. As part of the plan to install the new lines, the building owners would have to reroute their plumbing at their expense to hook into the new service lines. The building owners demanded that the city reroute the plumbing at the city's expense. When the city refused, the building owners sued in inverse condemnation. The city appealed the trial court's denial of its plea to the jurisdiction.¹¹⁵

The Dallas Court of Appeals noted that, "[a] governmental action can cause a physical invasion of property that rises to the level of a constitutional taking even though it may not physically appropriate the property."¹¹⁶ The court of appeals held that, "the evidence submitted did not raise a fact issue on physical taking" because "there was no claimed dam-

107. *Id.* at 67.

108. *Id.*

109. *Id.* (citing *City of White Settlement v. Super Wash, Inc.*, 198 S.W.3d 770, 774 (Tex. 2006)).

110. *Id.*

111. *Id.* at 67.

112. *Id.*

113. *Id.*

114. 200 S.W.3d 266 (Tex. App.—Dallas 2006, no pet. h.).

115. *Id.* at 270.

116. *Id.* at 272.

age other than having to pay to reroute the plumbing.”¹¹⁷ As a result, the court of appeals held that there was no evidence of a physical taking.¹¹⁸

The building owners also contended that the city’s requirement “constitute[d] a regulatory taking because it caused a direct and substantial interference with [the] use and enjoyment of their properties.”¹¹⁹ The court of appeals focused on the Texas Supreme Court analysis in *Sheffield Development Co., Inc. v. City of Glenn Heights*,¹²⁰ which included (1) the economic impact[], (2) the extent to which the regulation interfered with investment-backed expectations, and (3) the character of the governmental action.”¹²¹ Based on the market value of the properties, the required rerouting would decrease the value of the properties by only 2.75-9%. The court of appeals held that was not a significant adverse economic impact.¹²²

The building owners also argued that there was an investment-backed expectation that the city would pay for this cost because the Dallas City Code stated that when a substandard main was replaced, the city would “transfer and reconnect existing service connections. . . .”¹²³ The court of appeals agreed with the city’s interpretation that the phrase simply meant that the city could not refuse to reconnect service when it relocated a main, not that it must reroute the plumbing at city expense.¹²⁴ As a result, there was no “reasonable [investment-backed] expectation that the City would pay to reroute their plumbing because of city ordinances.”¹²⁵

With respect to the character of governmental action, the building owners argued, “the City exercised poor planning by allowing buildings to be constructed over the old main.”¹²⁶ It was undisputed, however, that Dallas did not relocate the old main to take advantage of the appellees. Further, “a city’s decision on whether and how to repair a sewer is a governmental function for which the city enjoys governmental immunity.”¹²⁷ As a result, “appellees did not allege a valid taking claim, and the City’s sovereign immunity was not waived.”¹²⁸

Whether or not a city can force a developer to waive an inverse condemnation claim was addressed during the Survey period in *Sefzik v. City of McKinney*.¹²⁹ The Texas Supreme Court ruling in *Town of Flower Mound v. Stafford Estates Ltd. Partnership*¹³⁰ held that a development

117. *Id.* at 273.

118. *Id.* at 273.

119. *Id.*

120. 140 S.W.3d 660 (Tex. 2004).

121. *Blanton*, 200 S.W.3d at 274 (citing *Sheffield Dev. Co., Inc. v. City of Glenn Heights*, 140 S.W.3d 660, 672-73 (Tex. 2004)).

122. *Id.* at 275.

123. *Id.* at 277.

124. *Id.* at 279.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. 198 S.W.3d 884, 892 (Tex. App.—Dallas 2006, no pet. h.).

130. 135 S.W.3d 620 (Tex. 2004).

exaction can be unconstitutional.¹³¹ Many cities require that a developer sign an agreement to develop an approved subdivision. A city will take the position that this “agreement” amounts to a waiver of the developer’s right to complain about the city’s constitutional violation.

In *Sefzik*, the Dallas Court of Appeals rejected this position by ruling that the developer in that case did not waive its right to file suit by signing such an agreement.¹³² The developer of Sefzik’s land was required to either build an off-site road or pay the city almost \$270,000 in escrow as a condition to development. The development would not even have direct access to the road if and when it was ever built.¹³³

After the development was completed, the property owners (who had been assigned the claims against the city by the developer) filed suit against the city. The trial court ruled in favor of the city and held that the developer had waived its right to complain about the constitutional violation. The court of appeals rejected the city’s waiver argument, recognizing that finding a waiver in this situation would be the same as imposing a requirement that the developer file suit *before* accepting development approval. The court of appeals rejected the city’s argument that the “choice” between two alternative exactions somehow made the developer’s agreement voluntary:

We conclude that choosing between alternative exactions does not bar a later challenge to the government’s imposition of either exaction as being a regulatory taking. If it did, then governmental entities could avoid any exposure to exaction takings claims merely by structuring its regulations to exact one of two (or more) alternatives and requiring the landowner to choose its position.¹³⁴

Another appellate decision which found a taking of private property rights is *City of San Antonio v. El Dorado Amusement Co.*¹³⁵ El Dorado owned a building which had been used for several years “as a bar, pool hall, and club, always selling alcoholic beverages.”¹³⁶ The property was rezoned in 1999 to prohibit the sale of alcoholic beverages. El Dorado then “applied for a non-conforming use to operate a bar with on-premises alcoholic consumption.”¹³⁷ After the city denied the request, El Dorado appealed to the Board of Adjustment. Following an adverse decision by the Board, El Dorado filed a takings claim against the city.¹³⁸

Because El Dorado’s property was not physically taken, [the San Antonio Court of Appeals] determine[d] whether the City imposed restrictions that either (1) denied El Dorado all economically viable use of its property, or (2) unreasonably interfered with El Dorado’s

131. *Id.* at 623.

132. *Sefzik*, 198 S.W.3d at 895.

133. *Id.* at 889.

134. *Id.* at 894.

135. 195 S.W.3d 238 (Tex. App.—San Antonio 2006, pet. denied).

136. *Id.* at 243.

137. *Id.*

138. *Id.* at 243.

right to use and enjoy its property. Determining whether all economically viable use of a property has been denied entails a relatively simple analysis of whether value remains in the property after the governmental action.¹³⁹

The court of appeals found that value still remained in the property.¹⁴⁰

Next, [the court of appeals] determine[d] whether the government unreasonably interfered with the landowner's right to use and enjoy the property. This determination requires a consideration of two factors: the economic impact of the regulation and the extent to which the regulation interferes with distinct investment-backed expectations. The first factor merely compares the value that has been taken from the property with the value that remains in the property. . . . The second factor is the investment-backed expectation of the landowner. "The existing and permitted uses of the property constitute the 'primary expectation' of the landowner that is affected by regulation."¹⁴¹ Knowledge of existing zoning is to be considered in determining whether the regulation interferes with investment-backed expectations. There [was] no dispute that El Dorado had a license to sell alcohol for on-premises consumption. In fact, prior to the rezoning, the property had always been operated as a business that served alcohol.¹⁴²

With respect to the adverse economic impact, the owner had invested \$800,000 in the building and property. For about ten to fifteen years, El Dorado leased the property to the same tenant for \$10,000 per month. After the downzoning, El Dorado leased the property for two months at \$3,000 per month. The property earned more income and higher profits when it operated with a license to sell alcohol. In January 2003, El Dorado sold the property for \$418,000.¹⁴³

The court of appeals:

conclude[d] this evidence support[ed] a finding that the enactment of the rezoning ordinance had a severe economic impact on El Dorado's business and unreasonably interfered with El Dorado's investment-backed expectations. Therefore, [the court of appeals] held that a compensable regulatory taking resulted from the City's rezoning of El Dorado's property and the taking caused El Dorado's damages.¹⁴⁴

IV. IMPACT FEES

In *DeSoto Wildwood Development, Inc. v. City of Lewisville*,¹⁴⁵ the city required the escrow of funds on roadway construction for a proposed res-

139. *Id.* at 245 (citing *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 935 (Tex. 1998)).

140. *Id.* at 246.

141. *Id.* (quoting *Mayhew*, 964 S.W.2d at 936).

142. *Id.*

143. *Id.* at 246-47.

144. *Id.* at 247.

145. 184 S.W.3d 814 (Tex. App.—Fort Worth 2006, no pet. h.).

idential subdivision. Following the city's rejection of the developer's demands for reimbursements of the escrowed funds, the developer sued for violations of the Texas Impact Fee Act (Chapter 395 of the Texas Local Government Code) and inverse condemnation under the Texas and United States Constitutions.¹⁴⁶

The first question addressed by the trial court was whether the escrowed funds were "impact fees" under Chapter 395. According to the city, the escrowed funds were not impact fees in accordance with the exception in section 395.001(4)(B) of the Texas Local Government Code, which applies to the construction of on-site facilities that is "required by a valid ordinance and is necessitated by and attributable to the new development."¹⁴⁷ The Fort Worth Court of Appeals reversed the trial court's holding on behalf of the city. Following the plain reading of the statute, the court of appeals held that the escrowed fees were "impact fees" that were *not* enacted as required by the statute.¹⁴⁸

Unfortunately for the developer, he waited until after all of the lots in the development were sold before filing the suit to recover the funds. Section 395.025(E) of the Texas Local Government Code provides that a refund shall be paid to the record owner at the time the refund is paid. Because the developer no longer owned any of the property in the subdivision, the court of appeals held that there would be no recovery of the escrowed funds.¹⁴⁹

The developer also brought a breach of contract action stating that the developer had not lived "up to its agreements regarding the use of the impact fees."¹⁵⁰ Initially, the court of appeals held that the city did not have sovereign immunity against developer's contract claims. The language in section 51.075 of the Texas Local Government Code authorized the filing of the breach of contract action.¹⁵¹

However, the court of appeals agreed with the city that the developer had not exhausted its administrative remedies prior to filing suit. While the city's attorney sent a letter rejecting the developer's demands, the city council did not vote on the matter.¹⁵² In addition, the court of appeals held that the developer's constitutional takings claims were not ripe because all administrative remedies were not exhausted.¹⁵³ Therefore, the court of appeals remanded the case to the trial court with instructions that the trial court abate its proceedings to afford the developer the opportunity to have the city council vote on the issue.¹⁵⁴

146. *Id.* at 818-19.

147. *Id.* at 819-20.

148. *Id.* at 821.

149. *Id.* at 822.

150. *Id.* at 824.

151. *Id.* at 824-25.

152. *Id.* at 825.

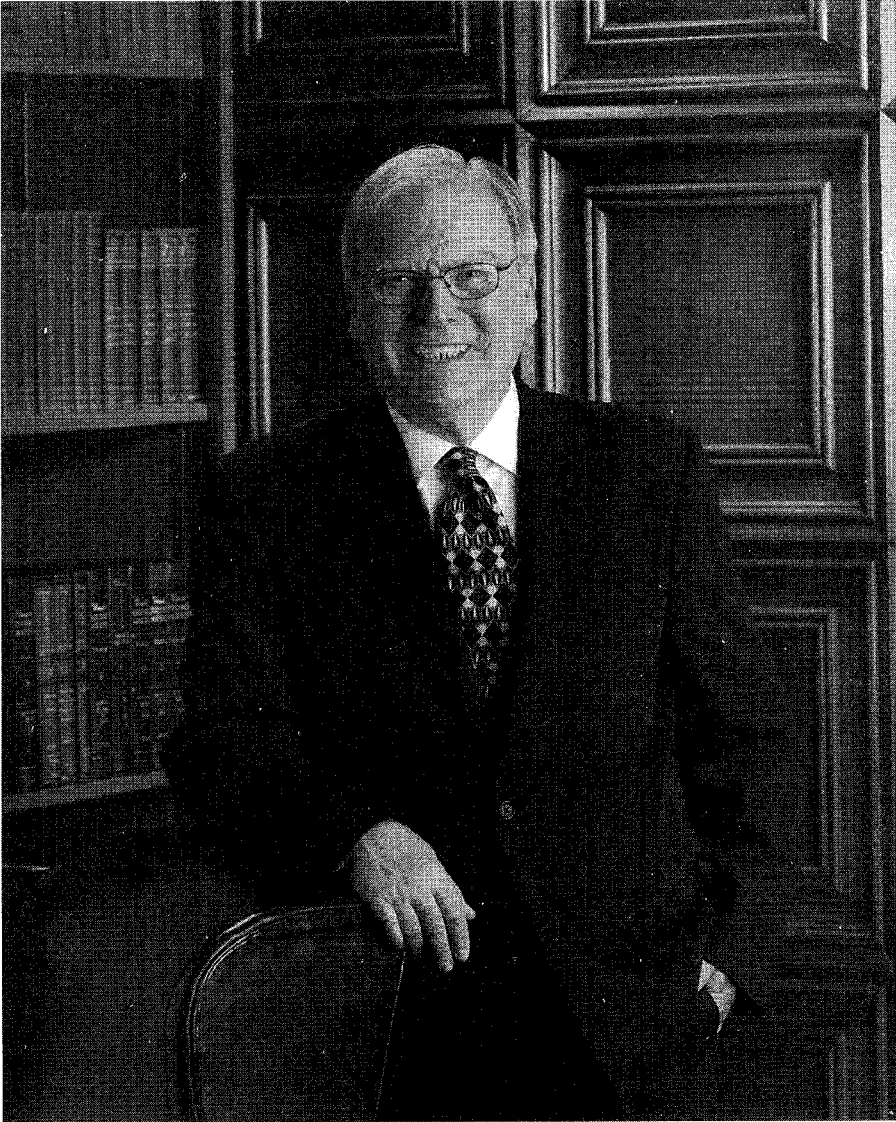
153. *Id.* at 827.

154. *Id.* at 826.





Tributes



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